STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 21, 2014
v	No. 315870 Oakland Circuit Court
KEYON LECEDRIC ROBERTSON, Defendant-Appellee.	LC No. 2012-242361-FH

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals by right the April 3, 2013 dismissal of one count of possession with intent to deliver more than 50 grams, but less than 450 grams, of heroin, MCL 333.7401(2)(a)(iii). The trial court granted defendant's motion to suppress the physical evidence seized from his person and subsequently dismissed the charge. We reverse and remand for reinstatement of the charge against defendant.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On July 12, 2012, Sergeant Sean Jennings of the Oakland County Sheriff's Office Narcotics Enforcement Team (NET) received an anonymous tip that an individual named Leroy Jackson would be at the bus station in Pontiac at approximately noon that day, that Jackson would be travelling "up north," and that he would be carrying heroin. Jennings used the Law Enforcement Information Network (LEIN) and the Secretary of State database to obtain a photograph and basic information about Jackson. He then arranged for a team of officers to conduct surveillance on the bus station.

At approximately noon, one of the officers on the surveillance team identified Jackson arriving at the bus station. Although the anonymous tip did not mention that Jackson would be travelling with another person, Jackson arrived at the bus station with defendant. Several officers, including Jennings, approached Jackson and defendant. Jennings confirmed Jackson's identity and asked the men where they were going; they responded "up north." Jennings then placed Jackson under arrest because there was an outstanding warrant for Jackson's arrest. Jackson was searched, but the officers did not find any drugs on Jackson.

After Jackson was arrested, the officers requested identification from defendant. Defendant gave one of the officers a Michigan identification card that identified him as "Kamone

Dwayne Robertson." A subsequent search of LEIN performed by two of the officers at the scene indicated that the information on the card was not valid.

While two officers were checking the information on the identification card provided by defendant, Jennings continued to talk to defendant. At the evidentiary hearing on defendant's motion to suppress, Jennings testified that as he talked to defendant:

> I just noticed [defendant] that - - to appear to be real nervous, sweating, just - - that - - that feeling that an officer gets that, you know, something was wrong and he's kind of a good-sized person so for my safety I decided to put him - - to restrain him and put him in handcuffs.

When Jennings asked defendant why he was nervous and sweating, defendant "just said it was hot outside." Jennings testified that on a scale of zero to ten, with zero representing someone who is not at all nervous and ten representing someone who is "the most nervous you've ever seen somebody," he would have ranked defendant at "about a seven." Jennings testified at the evidentiary hearing that the reason that he placed handcuffs on defendant at this time was that defendant's demeanor caused Jennings to be concerned for his own safety.

Jennings inquired if defendant and Jackson had luggage, and defendant indicated that they each had one bag, and that the bags were already inside the terminal. Jennings then requested that Deputy David Curtis, a canine handler with the Oakland County Sheriff's Office, and his canine, Finn, examine the two bags. Curtis and Finn were part of the surveillance team originally assigned to watch the bus station, so they were already present at the location. Curtis was certified as a master canine handler, and Finn was trained to detect cocaine, crack cocaine, marijuana, heroin, and methamphetamine. Curtis separated the two pieces of luggage and brought the dog to each piece of luggage. Finn "alerted on both bags," meaning that the dog indicated that both pieces of luggage either had narcotics inside of them, or had the odor of narcotics on the inside or outside of them. In addition, Curtis opined that based on Finn's immediate, sharp reaction to the luggage, the odor of the narcotics was strong and fresh. After Finn detected the odor of narcotics on the luggage, both bags were searched; no narcotics were found in either of the bags.

Jennings then asked defendant why Finn would have "alerted" on his bag, and defendant responded that he and Jackson had smoked marijuana earlier in the day. Jennings testified that "[b]asically, I said, I'm gonna search you[,] and he kind of nodded and half heartedly said, yes." Jennings confirmed that he "pretty much" made "a statement" that he was going to search defendant, as opposed to asking defendant's permission to search him, and that defendant was not free to leave at that point. However, Jennings also testified that if defendant had told him not to search at that point, he would not have conducted the search of defendant's person. Jennings lifted defendant's shirt and observed that defendant's pants were "real, real low where you could see a lot of the white boxer shorts that were underneath," including "the fly of the boxer shorts." Jennings observed what appeared to be the top of a clear plastic bag protruding from defendant's boxer shorts, and he believed that defendant was concealing narcotics in his boxer shorts. Jennings removed the bag from defendant's boxer shorts; the substance inside field-tested as heroin.

Defendant was arrested and transported to the Oakland County Jail. It was not until defendant was at the jail that Sergeant Jennings learned that the identification that defendant had provided to the officers was false. In addition, once defendant arrived at the jail, the officers discovered that there was an outstanding warrant for defendant's arrest.

Defendant was charged with one count of possession with intent to deliver more than 50 grams but less than 450 grams of heroin, MCL 333.7401(2)(a)(iii). After defendant was bound over to the circuit court, he moved to suppress certain statements that he made to Sergeant Jennings and to suppress the physical evidence seized from him. The prosecution stipulated to the suppression of the challenged statements. However, the prosecution opposed defendant's motion to suppress the heroin that was seized when defendant was searched.

On December 20, 2012, an evidentiary hearing was held on defendant's motion to suppress. The trial court declined to rule on the motion at that time, and ordered further briefing from the parties. Both the prosecution and defendant provided additional briefing as requested. On April 3, 2013, the trial court issued an opinion and order granting defendant's motion to suppress the physical evidence seized from him. The trial court first recognized that police can make a valid investigatory stop if an officer has a reasonable suspicion that crime is afoot. The trial court also recognized that during such an investigatory stop, the police may conduct "a constitutionally sound *Terry*[1] pat-down." However, the trial court noted that "[t]he People agree Detective Jennings' conduct went beyond a pat-down and was indeed a search." Therefore, the trial court's analysis focused on whether Sergeant Jennings had probable cause to search defendant. First, the trial court found that the information in the anonymous tip did not include information about defendant, so the anonymous tip did not provide Jennings with probable cause to search defendant. Second, the trial court found that because defendant "was not the initial person of interest upon observation," Finn's "alert" on defendant's luggage did not provide Jennings with probable cause to search defendant. Third, the trial court found that although defendant's admission that he smoked marijuana earlier in the day "provides an independent basis for arrest," it did not provide Jennings with probable cause to search defendant because "the People cannot now legitimize the improper detention in this case based on this information which was received after the fact." Fourth, the trial court found that although the fact that defendant provided false identification to the officers "is a misdemeanor which may have independently subjected Defendant to arrest," it did not provide Jennings with probable cause to search defendant because "just as with Defendant's admission to smoking marijuana, the false identification was not discovered until after officers illegally detained Defendant and subsequent to his arrest." The trial court concluded that "there was not probable cause for the detention, search[,] or questioning of Defendant, nor was same done pursuant to a warrant." Therefore, the trial court granted defendant's motion to suppress the physical evidence seized from him.

On April 8, 2013, the trial court held a pretrial hearing. At that time, defendant made an oral motion to dismiss the case, and the prosecution stated that based on the trial court's recent

[1] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 889 (1968).

opinion and order, it "would not be able to proceed" with the case. Therefore, the trial court entered an order dismissing the case without prejudice. The prosecution appeals as of right.

II. STANDARD OF REVIEW

To the extent a trial court's decision on a motion to suppress evidence is based on an interpretation of the law, appellate review is de novo. *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011). However, findings of fact are reviewed for clear error. *Id*. "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. (citation omitted).

III. ANALYSIS

Both the United States and Michigan Constitutions prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. See also *Antwine*, 293 Mich App at 194. "The Michigan constitutional provision is generally construed to afford the same protections as the Fourth Amendment." *Id*. at 194-195. Generally, a search or seizure conducted without a warrant is unreasonable under these constitutional provisions unless the search or seizure falls within a "specifically established and well-delineated" exception to the warrant requirement. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996).

A police officer is permitted to "seize," or detain, an individual, without a warrant, to conduct an investigation into potential criminal activity. An investigatory stop is appropriate when "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v Ohio*, 392 US 1, 30; 88 S Ct 1868; 20 L Ed 889 (1968). In order for law enforcement officers to make a constitutionally proper investigative stop, "[t]he totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity," and "[t]hat suspicion must be reasonable and articulable." *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). Further, when determining whether a reasonable suspicion exists to justify an investigative stop, "deference should be given" to experienced law enforcement officers, and "law enforcement officers are permitted, if not required, to consider 'the modes or patterns of operation of certain kinds of lawbreakers.'" *Id*. at 635-636.

In this case, the record supports the finding that the initial detention of defendant was a valid investigatory stop. Defendant arrived at the bus stop with an individual suspected to be transporting heroin. Jennings, the officer who detained defendant (and who was qualified as an expert in narcotics trafficking) testified that it is very common for individuals trafficking in narcotics to travel in pairs. At the time Jennings initially detained defendant, heroin had not been found on defendant's traveling companion, which led him to believe that defendant was transporting the heroin. Further, after he asked defendant for identification, defendant appeared to be very nervous. Defendant's nervousness upon questioning and a request for identification supports a finding that defendant was involved in criminal activity. *People v Jenkins*, 472 Mich 26, 34; 691 NW2d 759 (2005). See also *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001) (citation omitted) (holding that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). Giving deference to Jennings's 21 years of experience as a

police officer and expertise in narcotics trafficking, which permitted him to draw inferences and make deductions that might well elude an untrained person, we find that at the time he initially approached defendant, spoke with him, and asked him for identification, he had a reasonable suspicion, based on the totality of the circumstances, that defendant had been, was, or was about to be engaged in criminal activity. *Jenkins*, 472 Mich at 33; *Nelson*, 443 Mich 632, 635-636.

Moreover, police officers are permitted to minimize risk of harm to both the police and the occupants of the surrounding area by utilizing handcuffs during an investigatory stop. *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988). Because an investigation regarding, and the search for, narcotics "is the kind of transaction which may give rise to sudden violence," such an investigation may warrant the use of handcuffs on a detained individual. *Id*. The present case involved an investigation regarding, and a search for, narcotics, and the officer testified that defendant's nervous behavior made the officer concerned for his personal safety. Therefore, it was reasonable for Jennings to detain defendant by placing him in handcuffs during the investigatory stop, and the use of handcuffs did not convert the investigative stop into an arrest. *Id* at 14-15. See also *People v Green*, 260 Mich App 392, 397-398; 677 NW2d 363 (2004), overruled in part on other grounds by *People v Anstey*, 476 Mich 436 (2006).

During this investigatory stop, officers diligently pursued a means of investigation that was likely to quickly confirm or dispel their suspicions that defendant was transporting heroin. *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992). In this case, a trained canine sniffed and "alerted on" defendant's bag. At that point, the positive alert could have "resulted in his justifiable arrest on probable cause." See *Florida v Royer*, 460 US 491, 506; 103 S Ct 1319; 75 L Ed 229 (1983); see also *United States v Williams*, 726 F2d 661, 663 (CA 10, 1984), cert den 467 US 1245 (1984), quoting *United States v Waltzer*, 682 F2d 370, 372 (CA 2, 1982), cert den 463 US 1210 (1983) ("[A] drug sniffing dog's detection of contraband in luggage 'itself establish[es] probable cause, enough for the arrest, more than enough for the stop.'"). Therefore, once Finn alerted on defendant's bag, Jennings had probable cause to arrest defendant,[2] and the subsequent search of defendant was a valid search incident to arrest.

[2] The fact that no drugs were found in defendant's luggage did not dissipate probable cause to arrest under the facts of this case. In *People v Nguyen*, ___ Mich App ___; ___ NW2d ___ (2014), slip op at 8, this Court examined a similar factual scenario involving information from an informant, probable cause to arrest, and a fruitless initial search, and stated:

> Although the district court viewed the failure to find the cocaine during the initial pat-down for weapons and vehicle search as facts supporting the dissipation of probable cause, the circuit court held that these facts demonstrated it was more probable that the cocaine was on defendant's person. The evidence supports the circuit court's conclusion that probable cause did not dissipate. The ICE agents and police received information that defendant possessed a substantial amount of cocaine from a reliable and credible informant. Defendant failed to stop his vehicle as ordered by Officer Piltz, and while he continued to drive, defendant made evasive movements indicating he was moving or hiding something. The fact that cocaine was not found either during the pat-down search, which was

Champion, 452 Mich at 116; *Green*, 260 Mich App at 398.[3] The trial court clearly erred in concluding to the contrary, based on the fact that defendant was not the "initial person of interest."

Further, after defendant's bag was searched, and while defendant was still validly detained pursuant to an investigatory stop, the officer asked defendant why the dog alerted on defendant's bag. Defendant replied that he had smoked marijuana earlier that day. At this time, the officer also had probable cause to arrest defendant for possession of marijuana. See MCL 333.7403(2)(d) and MCL 764.15(1)(d). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Champion*, 452 Mich at 115. Defendant's admission to smoking marijuana, as well as Finn's alert on an item belonging to defendant, provided Jennings with probable cause to believe that defendant was in possession of marijuana. See *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011); see also *United States v Taylor*, 471 Fed Appx 499, 511-512 (CA 6, 2012). Further, the fact that Jennings may have subjectively anticipated that his search would reveal marijuana, as opposed to heroin, does not

> geared toward searching for weapons, or the search of defendant's vehicle, did not lead to the dissipation of probable cause. Rather, given the credible and corroborated information from the CI that defendant possessed cocaine, that cocaine was not recovered during the pat-down search for weapons or the search of the vehicle, and that defendant may have disregarded the order to stop his vehicle to take time to hide the cocaine in his pocket, the circuit court did not err in finding that probable cause for the arrest continued to exist during the second search of defendant.

Here, the police had received an anonymous tip that had been corroborated with regard to Jenkins's location and direction of travel. Additionally, although no drugs had been located on Jenkins's person or in either bags possessed by the duo, defendant acted extremely nervous and a drug-sniffing dog had alerted on the bags. Further, defendant essentially immediately admitted to smoking marijuana, as described above. We conclude, as this Court did in *Nguyen*, that probable cause to arrest did not dissipate following the fruitless search of the bags.

[3] In *Champion*, 452 Mich at 116, our Supreme Court explained that a warrantless search of a person whom the police have probable cause to arrest is proper, even though the person has not yet been formally arrested. "A search conducted immediately *before* an arrest may be justified as incident to arrest if the police have probable cause to arrest the suspect before conducting the search." *Id*. (emphasis added), citing *Rawlings v Kentucky*, 448 US 98, 111; 100 S Ct 2556; 65 L Ed 2d 633 (1980) (holding that when "the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa"). See also *People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988) (holding that because the officers had probable cause to arrest the defendant and the other occupants of the house, the search of all of these individuals was proper, and quoting with approval a Michigan Supreme Court holding that "[i]f the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden" (citation omitted)).

change the validity of the search because a police officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v United States*, 517 US 806, 813; 116 S Ct. 1769; 135 L Ed 2d 89 (1996). Since defendant was properly detained at the time of his admission regarding smoking marijuana, the trial court clearly erred in concluding that the admission occurred "after the fact" and at a time in which defendant was "illegally detained."

We emphasize that both of the above findings of probable cause are made in the totality of the circumstances in the instant case. Jennings testified that at the time he searched defendant, "the whole entire circumstance leading up to that point" led him to believe that there was probable cause to believe defendant possessed illegal narcotics. He testified that in his experience as an expert in narcotics trafficking, it is very common for individuals trafficking in narcotics to travel in pairs. The information from the anonymous tipster had proven accurate; Jackson indeed appeared at the bus station around noon and indicated that he was travelling "up north." Defendant acted extremely nervous in his interactions with Jennings, and admitted to smoking marijuana that day. Further, the fact that Finn strongly alerted to both defendant's and Jackson's luggage led him to believe that one of the two individuals possessed the drugs indicated by the anonymous tipster, but no drugs had been found on Jackson or in either of the bags. The totality of these circumstances leads to our finding of probable cause in the instant case. In fact, even absent the alert from a drug-sniffing dog *and* defendant's admission to smoking marijuana, sufficient probable cause may have existed, not to arrest defendant, but to perform a search of his person. See *People v Levine*, 461 Mich 172, 185; 600 NW2d 622 (1999) (holding that an anonymous tip, when corroborated by additional information, can provide probable cause to support a warrantless search).

We hold that, examining the totality of the circumstances, the trial court clearly erred when it suppressed the heroin found in defendant's possession, as both the drug-sniffing dog alert on defendant's luggage and defendant's admission to smoking marijuana, when viewed in the totality of the circumstances, provided probable cause to arrest defendant, and thus, the search performed of his person was a valid search incident to arrest.

In light of this holding, we decline to address the prosecution's remaining arguments concerning whether defendant's provision to the police of identification later revealed to be false, or the fact that defendant was the subject of an outstanding arrest warrant for parole violation, established probable cause to arrest defendant.

We reverse the order of dismissal, as well as the order of suppression, and remand for reinstatement of the charge in this case and further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra